

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 19 2016

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-46-002709

Derrick Antron Young,

Appellant,

v.

The State of South Carolina,

Respondent.

**RESPONSE TO RETURN FOR
WRIT OF CERTIORARI**

Respectfully Submitted,

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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in the Petition for Writ of Certiorari, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondent.

- I. Petitioner's plea counsel was ineffective in plea proceedings by failing to provide full and fair representation of Petitioner's rights under counsel's Constitutional obligation and failing to fully investigate the Petitioner's case by neglecting to subpoena necessary witnesses.

The post conviction relief (PCR) court erred in finding that Petitioner failed to meet his burden in proving that plea counsel was deficient. At the PCR hearing, Petitioner repeatedly testified that throughout various meetings with plea counsel, plea counsel told Petitioner that he was to receive a seven (7) year sentence as part of a plea bargain. (App. p. 52-54, 56-58). In a meeting less than a week before the plea hearing on October 4, 2012, plea counsel restated that Petitioner would expect a seven (7) year sentence. (App. p. 52). Additionally, in repeatedly advising Petitioner that he should plead guilty and accept the seven-year sentence, plea counsel did not present all of the State's evidence in order for Petitioner to fully assess whether he should proceed to trial. Consequently, plea counsel did not fully investigate the evidence against Petitioner when advising Petitioner to plead guilty, nor did plea counsel interview the witnesses Petitioner testified he wanted plea counsel to investigate in forming the opinion that Petitioner would not be successful at trial. (App. p. 55, 63, 70). Plea counsel's misadvising regarding the non-existent plea agreement, and his failure to fully investigate evidence and witnesses rendered Petitioner's guilty plea unknowingly and involuntarily made in

violation of his Constitutional rights. Had Petitioner known that he was not going to receive a seven (7) year sentence as advised, he would have proceeded to trial.

The Supreme Court has held that a guilty plea is voluntarily and knowingly made when it is established that the defendant has a full understanding of his plea's consequences and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The defendant must be advised of the constitutional rights he is waiving when pleading guilty. Id. Moreover, to find ineffective assistance of counsel, the defendant must demonstrate that counsel failed to render reasonably effective assistance under prevailing professional norms, and counsel's deficient performance prejudiced his case. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The Strickland test requires a petitioner to make a showing on both prongs in order to prove ineffective assistance of counsel. Strickland, 466 U.S. at 687. Moreover, in regard to counsel's deficiency in advising whether to plead guilty, "the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013).

In the present case, Petitioner's plea counsel rendered ineffective assistance of counsel and caused Petitioner to enter a guilty plea that was not knowingly or voluntarily made on various fronts. First, Petitioner pled guilty thinking that he was going to receive a seven (7) year sentence. The South Carolina Supreme Court has held that "A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel

was not within the range of competence demanded of attorneys in criminal cases.”

Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993). Repeatedly advising Petitioner of a plea bargain that was later discovered not to exist cannot be deemed within the range of competence demanded of South Carolina criminal defense attorneys.

Additionally, in Dean v. State, the South Carolina Court of Appeals held that the deficiency prong of Strickland is met if the guilty plea was based on inaccurate sentencing advice from counsel. No. 2015–UP–176, 2015 WL 1481686 (Apr. 1, 2015 Ct. App.)(quoting Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991)). Plea counsel’s repeated assertions that there was a seven (7) year plea agreement that never came to exist most certainly constitutes as inaccurate sentencing advice. Moreover, although a court will consider the plea hearing transcript to determine whether information conveyed by the plea [court] cured any possible error made by counsel, Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003), in the Petitioner’s case, the colloquy during the plea hearing did not correct plea counsel’s error. Although the judge stated that Petitioner could receive the maximum sentences for his charges, 7 to 30 years, up to 10 years, and to 30 years respectively, this presentment did not negate Petitioner’s understanding that he would receive seven (7) years. Not only do defendants have the right to know the maximum sentences they face, judges are allowed to reject plea bargains and thus the advisement of the maximum penalties did not overcome plea counsel’s repeated assertions that a plea bargain was struck. Particularly because plea counsel told Petitioner that he had worked out the seven (7) year sentence with the judge. (App. p. 53, 58).

Respondent argues that Petitioner’s guilty plea was not unknowingly or involuntarily made because Petitioner signed sentencing sheets that stated that his plea

was "Without Negotiations or Recommendation. (Return to Pet. for Writ of Cert., 8). However, as a layperson, Petitioner did not possess the knowledge to understand that "Recommendation" or "Negotiation" was not the equivalent to a plea agreement, nor did counsel advise him of the meaning of these terms on his sentencing sheet. In fact, plea counsel testified he was not even sure if he met Petitioner to discuss the sentencing after the plea hearing. (App. p. 88-89). Petitioner was also not advised that the plea agreement he had continually told he had was also not equivalent to a "promise" to plead guilty at the plea hearing. Nothing in the record demonstrates to the contrary—that plea counsel explained the previously mentioned terms with Petitioner. Furthermore, although the nine (9) year sentence plea bargain was withdrawn after Petitioner failed to appear for a hearing, counsel never advised that the seven (7) year sentence was no longer available. (App. p. 13). Additionally, the nine (9) year sentence was negotiated in June, and was withdrawn, whereas plea counsel advised Petitioner he would receive seven (7) years just five days before the plea hearing. (App. p. 52).

Moreover, in its dismissal of Petitioner's PCR, the court noted that there was no evidence presented of the seven (7) year sentence. (Supp. App. p. 6). However, counsel's repeated advisement about the seven (7) year sentence was conveyed to Petitioner verbally in their meetings, and even if counsel had communicated it in writing, plea counsel's file was lost due to water damage. (App. p. 87). Regardless, Petitioner's mother Gail Barton, was unavailable to testify at the PCR hearing but was present for some of the meetings between Petitioner and plea counsel. Barton witnessed plea counsel stating that Petitioner would receive a seven (7) year sentence. (See Exhibit 1, sworn Affidavit of Gail Barton).

Petitioner was prejudiced by plea counsel's repeated assertions that he would receive a seven (7) sentence. Petitioner repeatedly testified at the plea hearing that he relied on his plea counsel's assertions and at the time, did not know his constitutional rights may have been violated and that he had constitutional violation grounds to pursue. (App. p. 59, 68). Petitioner was also dissatisfied and distraught by the 13-year sentence, as it was almost 50% longer than the sentence Petitioner was expecting. Petitioner was now faced with a sentence that caused him to miss his children's childhoods. Petitioner also repeatedly asserted that his case had various worthy Fourth Amendment issues. (App. p. 61-68). Thus, pursuant to Strickland, Petitioner was prejudiced because had his plea counsel not fabricated a seven (7) year sentence, he would not have pled guilty and demanded on going to trial. (App. p. 68).

Plea counsel also rendered ineffective assistance of counsel in the failure to investigate and present evidence to Petitioner and interview favorable witnesses. Petitioner testified that plea counsel did not have all of the State's discovery to review with him, particularly police video and audio of the traffic stops. (App. p. 55, 62-63). Therefore, Petitioner did not know of, let alone examine or weigh the evidence presented against him. Accordingly, he did not knowingly waive his constitutional trial rights such as presenting evidence, and cross-examining witnesses who testify against him. In making his guilty plea, Petitioner was under the impression that he was without evidence, or was unaware that more evidence existed that he could have evaluated. Consequently, plea counsel's failure to present Petitioner with all the evidence acquired against him also rendered his guilty plea unknowingly made. In its dismissal of the PCR, the court noted that the evidence Petitioner argued was not presented to him may not even exist, as plea

counsel testified that he did not believe that any police video or audio existed. (Supp. App. p. 5). The PCR court erred in finding that plea counsel was not deficient in failing to investigate Petitioner's case on this ground because proof has been recovered showing that these video and audio recordings do exist, and would have been given to plea counsel in discovery. (App. p. 136; See Exhibit 2, an Officer Input Form by Lindsey Kicklighter). Therefore, plea counsel possessed or had access to evidence that Petitioner had a right to review in deciding whether to proceed to trial. Furthermore, Petitioner testified that he had advised plea counsel of witnesses he would like to have interviewed for trial preparation, and plea counsel failed to do so. (App. p. 70). Without the chance to evaluate what the witnesses would testify to at trial and without much evidence, Petitioner did not believe he had any feasible choice but to plead guilty and accept the seven (7) year sentence.

II. The circuit court lacked jurisdiction over Petitioner's guilty pleas because although he pled guilty in Greenville County, some of the alleged offenses occurred in Anderson County.

At the plea hearing, in response to the court advising Petitioner that he could receive life without parole if he committed a third offense, Petitioner's plea counsel answered that some of the charges were from Anderson County and "[w]e're waiving." (App. p. 23).

First, Greenville County circuit court does not have jurisdiction to entertain any charges from Anderson County. See State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 498 (2005) ("this Court has held that subject matter jurisdiction is the power of a court to

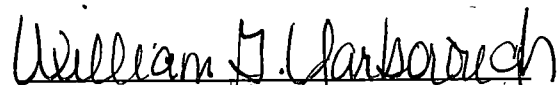
hear and determine cases of the general class to which the proceedings in question belong"). Additionally, not only did plea counsel not explain to Petitioner the concept of jurisdiction, but also counsel does not have the right to waive jurisdiction for his client or at all. Subject jurisdiction cannot be waived, even if the parties consent. E.g. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

CONCLUSION

The findings of the PCR court should be reversed because plea counsel's repeated false assertions that a plea bargain was struck rendered Petitioner's guilty plea involuntarily and unknowingly made. Additionally, plea counsel did not fully investigate the evidence acquired by the State and consequently, did not allow Petitioner to evaluate all the State's evidence. Thus, Petitioner was unaware of all of the evidence against him when forming his decision, under the advice of plea counsel, to plead guilty. Petitioner also made plea counsel of aware of witnesses who could testify on his behalf and plea counsel neglected to interview and investigate the testimony they could have presented at trial. Plea counsel's lack of investigation of evidence and witnesses left Petitioner with the understanding that he had no chance at trial and that a guilty plea was his only option. Plea counsel's grievances constitute as ineffective assistance of counsel pursuant to Strickland. Petitioner was prejudiced by plea counsel's errors because had he known he was not going to receive a seven (7) year sentence and known all of the State's evidence against him, he would not have pled guilty and would have proceeded to trial. Lastly, plea counsel had no right to waive jurisdiction of Anderson County charges in Greenville

County circuit court on behalf of Petitioner or at all. Accordingly, Petitioner requests a new plea hearing so that he may plead not guilty and proceeded to trial.

Respectfully Submitted,



William G. Yarborough
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Affidavit of Gail Barton

COUNTY OF GREENVILLE

STATE OF SOUTH CAROLINA

My name is Gail Barton, and I am the mother of Derrick Antron Young who is currently incarcerated at Evens Correction Institute in Bennettsville, South Carolina. I live at 103 South Estates Drive, Greenville, South Carolina 29605.

I was present during at least two occasions when Chris Posey discussed a possible Plea Agreement with my son concerning his charges. On both of these occasions, Mr. Posey instructed my son that the maximum sentence would be seven (7) years. Therefore, it was my understanding that my son would be serving a maximum of seven (7) years.

The undersigned, Gail Barton, being duly sworn, hereby deposes and says:

1. I am over the age of 18 and am a resident of the State of South Carolina. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.
2. I suffer no legal disabilities and have personal knowledge of the facts set forth below.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

Executed this 26th day of November, 2014.

Gail Barton

Gail Barton

OFFICER INPUT FORM

PLEASE COMPLETE ALL BLANKS

TO: Matthew Scott Waters
Greenville County Sheriffs Office - WP
FROM: Lindsey Kicklighter
Legal Investigator, Solicitor's Office
DATE: March 30, 2011
RE: THE STATE vs. DERRICK ANTON YOUNG
CASE NO.: 012011036258, 012011038064

WARRANT#: I432078, I432169, I432171 CHARGE: Poss. of other controlled sub. X2. Manufacturing Cocaine

Assistant Solicitor JEFF WESTON has been assigned the above case for prosecution and needs your input in deciding how best to proceed. Please complete this memo and return it to me at your earliest convenience. Please feel free to contact me at (864) 467-8647 should you have any questions. You may fax your response to me at (864) 467-8610 or email me at lkicklighter@greenvillecounty.org.

My telephone numbers are: (Home) _____ PLEASE COMPLETE THIS PORTION.
(PHONE NUMBERS REQUIRED) (Work) _____
(Pager) _____

- I wish to be present for any plea
I recommend you use your own discretion in the disposition of these charges.
Please contact me if you intend to reduce the charge as part of a plea arrangement.
I recommend or have no opposition to the following:

Dismissal: _____ PTI: _____ Probation: _____

I recommend incarceration because: Subject is a repeat offender and flight risk. Multiple documented cases of Subject fleeing from Police

* Are there video/media in this case? [X] Yes [] No

* Are you in possession of any supplemental not in Records: [] Yes [X] No

* If answer to above is "YES", please forward videos/media and supplemental as soon as possible.

Are there any co-defendants? [X] Yes [] No

If yes, give names. Antonio Lamont Mille

Have you worked this Defendant prior to these charges? [] Yes [X] No

Are you currently working this Defendant? [] Yes [X] No

Do you anticipate working this Defendant in the future? [] Yes [X] No

Is your CI available to testify in Court? [] Yes [X] No

Any asset seized or forfeited in this case? [] Yes [X] No

Describe: _____

**PLEASE INCLUDE SIGNED COPY OF SEARCH WARRANT (IF APPLICABLE).

Matthew S. Waters #1103/122
Officer Signature

Exhibit # 3

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

James R. Barber, III, Circuit Court Judge

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S.C. SUPREME COURT

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PROOF OF SERVICE OF
RESPONSE TO RETURN FOR WRIT OF CERTIORARI

I hereby certify that I delivered by US Mail a copy of the RESPONSE TO RETURN FOR WRIT OF CERTIORARI in the above-captioned case to South Carolina Senior Assistant Deputy Attorney General, Karen C. Ratigan, at the following address: PO Box 11549, Columbia, SC, 29211-1549



Traci Trouton-Burr, Paralegal
Office of William G. Yarborough, Attorney at Law

January 13, 2016